

**Tentative Rulings for August 9, 2016**  
**Departments 402, 403, 501, 502, 503**

---

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

13CECG03906	<i>Arteaga v. Fresno Community Regional Medical Center</i> (Dept. 402)
14CECG01472	<i>Gill v. Fresno Community Regional Med. Ctr.</i> (Dept. 402)
14CECG02305	<i>Stevenson v. Fresno Community Regional Med. Ctr.</i> (Dept. 402)
14CECG02360	<i>Riddle v. Community Medical Centers</i> (Dept. 402)
15CECG01565	<i>Maldonado v. Fresno Community Regional Med. Ctr.</i> (Dept. 402)
16CECG00791	<i>Riddle v. Community Medical Centers</i> (Dept. 402)
16CECG01603	<i>Nelson McKee and Yolanda McKee v. Allen Gilbert Holzhauer and Volkswagen of Palm Springs</i> (Dept. 501)

---

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

14CECG00069	<i>Timothy Sailors v. City of Fresno</i> is continued to Thursday, September 1, 2016 at 3:30 p.m. in Dept. 503.
16CECG00653	<i>State of California v. Lamoure's Incorporated</i> is continued to Tuesday, August 16, 2016 at 3:30 p.m. in Dept. 501.
14CECG03039	<i>Dhillon Manmohan v. Anheuser-Busch</i> is continued to Tuesday, August 16, 2016 at 3:30p.m. in Dept. 503.

---

(Tentative Rulings begin at the next page)

# **Tentative Rulings for Department 402**

(29)

## **Tentative Ruling**

Re: **Central Valley Community Bank v. Cal-Dak International, LLC, et al.**  
Superior Court Case No. 16CECG01585

Hearing Date: August 9, 2016 (Dept. 402)

Motion: Demurrer

### **Tentative Ruling:**

To overrule. (Code Civ. Proc. §430.10(e), (f).)

### **Explanation:**

#### **Commission Merchants:**

Food and Agricultural Code section 56105, subdivision (c) provides that a party that sells any farm product on commission is a commission merchant. Defendants sold Plaintiff's assignors' raisins for a commission, thus Defendants were commission merchants in their transactions with Plaintiff's assignors.

#### **Fraud - intentional misrepresentation:**

Allegations of fraud must be pleaded "with particularity," requiring the following elements: misrepresentation (false representation, concealment or nondisclosure); knowledge of falsity (or "scienter"); intent to defraud, i.e., to induce reliance; justifiable reliance; and resulting damage (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App4th 347, 363; see also Food & Agr. Code §56278.) Every element of a cause of action for fraud must be alleged in full, factually and specifically. (*Hills Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 707.)

Here, Plaintiff clearly alleges that Defendants routinely misrepresented the market prices for raisins, did so with knowledge that the actual prices were higher than represented, with the intent of inducing Plaintiff's assignors to rely on the misrepresentations so that Defendants could retain the price difference, and that Plaintiff's assignors reasonably relied on these misrepresentations, which caused Plaintiff's assignors, and by extension Plaintiff, damage by way of lost profits. Plaintiff has sufficiently alleged its first cause of action.

#### **Fraud - concealment:**

"As with all fraud claims," the elements of a concealment claim are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage. (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th

1178, 1185–86.) A fraud claim based upon concealment of a material fact must involve a defendant who had a legal duty to disclose the fact. (Civ. Code § 1710(3); see *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 735 [person charged with concealment of facts must be under a legal duty to disclose them].) Concealment may constitute actionable fraud where defendant is in a fiduciary relationship with plaintiff, had exclusive knowledge of material facts not known to the plaintiff, actively conceals a material fact from the plaintiff or makes partial representations while also suppressing some material facts. (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336.)

Plaintiff here alleges Defendants were in a fiduciary relationship to Plaintiff's assignors pursuant to the terms of the Agreement, and that Defendants acted as commission merchants for Plaintiff's assignors, representing Plaintiff's assignors in transactions with raisin purchasers. Plaintiff alleges further that Defendants systematically and intentionally concealed from Plaintiff's assignors the actual prices that buyers were willing to pay for raisins, and that Plaintiff's assignors could not have ascertained the true prices. Plaintiff states that Defendants intended to deceive Plaintiff's assignors in order to keep the difference in price for themselves, that Plaintiff's assignors would not have sold the raisins for the lower values had Defendants not misrepresented the dollar amounts, and that Plaintiff's assignor's reliance was justifiable and caused Plaintiff harm. Plaintiff has sufficiently alleged its concealment cause of action.

*Breach of the covenant of good faith and fair dealing:*

“ ‘Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.’ [Citation.]” (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683.) Though breach of the implied covenant is frequently pleaded as a separate count, it is “necessarily a breach of contract” (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393-1394.) To establish breach of the covenant of good faith and fair dealing, plaintiff must show that (1) plaintiff and defendant entered into a contract; (2) plaintiff did all, or substantially all of the significant things that the contract required plaintiff to do (or that plaintiff was excused from performance); (3) all conditions required for defendant's performance had occurred or been excused; (4) defendant unfairly interfered with plaintiff's right to receive the benefits of the contract; (5) plaintiff was harmed by defendant's conduct. (CACI No. 325.)

In the instant action, Plaintiff alleges the Agreement included an implied covenant of good faith and fair dealing that neither party would do anything to deprive the other of the benefit of the contract, and that Defendants breached this covenant by misrepresenting the purchase and sale transactions. Plaintiff alleges that its assignor WCG performed pursuant to the agreement by paying commissions to Defendants based on the representations of Defendants that the raisins had been sold to a third party at market price. Plaintiff alleges Defendants breached the covenant by instead purchasing the raisins themselves and then selling to a third party purchaser for a higher price, causing harm to Plaintiff by remitting to Plaintiff's assignors a reduced payment for each sale. Plaintiff has sufficiently plead its breach of the covenant of good faith and fair dealing cause of action.

### Breach of fiduciary duty:

The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach. (*People v. Rizzo* (2013) 214 C.A.4th 921, 950.) An agency relationship is a fiduciary one, and the agent is obligated to act in the interest of the principal. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977; see also *Mendoza v. Rast* (2006) 140 Cal.App.4th 1395, 1406 [allegation that [respondent consignees] breached fiduciary duties by using false or misleading invoices, reports, and other documentation to reduce and conceal sums owing to [appellant grower] while selling to others for prices higher than those reported to [appellant grower] adequately alleged breach of fiduciary duty].)

Plaintiff here alleges that Defendants had a fiduciary duty to Plaintiff's assignors to act with the utmost good faith and to refrain from self-dealing, that Defendants breached this duty by intentionally misrepresenting the market price of raisins, and retaining the difference in price. Plaintiff has sufficiently alleged its cause of action for breach of fiduciary duty.

### Conversion:

Conversion is the wrongful exercise of dominion over the property of another. (*Mendoza, supra*, 140 Cal.App.4th at pp. 1404-1405.) The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. (*Id.* at p. 1405.)

A commission merchant that sells farm products and fails to turn over the definite sum received to the farmer may be liable for conversion. (*Fischer v. Machado* (1996) 50 Cal.App.4th 1069, 1073-1074; see also *Mendoza, supra*, 140 Cal.App.4th at pp. 1404-1405; [allegation that commission merchant who sold farm products for grower then retained proceeds stated cognizable claim for conversion, applying rule in *Fischer, supra*].)

Though generally money is an improper subject for a conversion claim unless a specific sum can be alleged, it has been held that where an agent is required to turn over to its principal a definite sum received on the principal's account, the proper remedy is conversion. (*Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681; see also *Fisher, supra*, 50 Cal.App.4th at p. 1072.)

In the case at bench, Plaintiff alleges that Plaintiff's assignors had a right to possess the monies retained by Defendants that came from the sale of Plaintiff's assignors' raisins, that Defendants wrongfully kept said proceeds, and Plaintiff suffered damage thereby. Plaintiff has sufficiently alleged its cause of action for conversion.

Violation of produce dealers' statute (Food & Agr. Code §56010 et seq.):

Plaintiff alleges multiple violations of the produce dealers' statute, specifically violation of sections 56602, 56605, 56611, 56613, 56615, and 56623, arising from Defendants' alleged misrepresentation of the market price of Plaintiff's assignors' raisins and retention of the price difference.

Plaintiff alleges Defendants engaged in wrongful conduct by making fraudulent charges or returns, purchasing Plaintiff's assignors' raisins for themselves without informing Plaintiff's assignors the raisins were not being purchased by a third party, intentionally making false and misleading statements regarding the raisin market, engaging in unfair practices, fraud, deceit and willful negligence, and collecting or receiving funds without making prompt and proper payment to Plaintiff's assignors. Defendants argue that the complaint does not allege that WCG consigned raisins to Defendants, and that because Defendants purchased raisins from Plaintiff's assignor WCG, which was a processor, that the produce dealers' statute is inapplicable.

Defendants do not establish that WCG's alleged exemption from the produce dealers' statute exempts a commission merchant. The definitions for the various entities covered by Chapter 7 are phrased in terms of that entity's actions, not the actions or status of a party with whom the entity is conducting business. (See Food & Agr. Code §56161; see also *People v. Mulholland* (1940) 16 Cal.2d 62, 69 [" 'It is the duty of the courts to construe such enactments in the light of reason. [The licensing requirement for commission merchants] was intended to protect the farmer in disposing of [his] products[.]' "]) Commission merchants are clearly included in the regulatory scheme of the produce dealers' statute. (See Food & Agr. Code §§ 56101, 56105; *Mulholland*, supra, 16 Cal.2d at p. 69.) Plaintiff's allegations sufficiently plead violation of the produce dealers' statute.

Request for Judicial Notice:

The Court declines to take judicial notice as requested by Defendants. (Evid. Code §452; *Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879; *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914.)

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:**     JYH     **on 8/8/16.**  
                    (Judge's initials)           (Date)

(5)

**Tentative Ruling**

Re: ***Riyad Saddouq v. Wells Fargo, Inc.***  
Superior Court Case No. 16 CECG 01575

Hearing Date: August 9, 2016 **(Dept. 402)**

Motion: Demurrer to the Original Complaint

**Tentative Ruling:**

To sustain the general demurrer with leave to amend. The time in which the complaint can be amended will run from service by the clerk of the minute order plus 5 days for service by mail. [CCP § 1013].

**Explanation:**

Background

On June 24, 2014, Wells Fargo filed a limited civil action against Riyad Saddouq for breach of contract based upon his failure to make payments on a credit card issued by Wells Fargo. The amount owed was \$9,800. The case was filed as 14 CECL 05299. Default was entered on September 22, 2014. A clerk's judgment was requested and entered on October 23, 2014 in the amount of \$10,095 (including costs.) A writ of execution was issued on November 19, 2015.

On May 17, 2016, Saddouq filed a Complaint against Wells Fargo purporting to allege two causes of action for negligence and violation of Bus. & Prof. Code § 172000 et seq. On June 30, 2016, Defendant filed a general demurrer to each cause of action. In addition, Defendant claims that the action is barred by the doctrine of res judicata.

The Defendant attempted to comply with the "meet and confer" requirement of CCP § 430.41(a). However, counsel was not in possession of Plaintiff's telephone number and the email address was inoperative. See Declaration of Huber at ¶4. As a result, a letter was sent. Id. at ¶5. Compliance with CCP § 430.41(a) will be excused under the circumstances. Opposition and a reply were filed.

Defendant's Request for Judicial Notice

Defendant requests judicial notice of:

1. Summons and Complaint filed by Wells Fargo on June 24, 2014, in Fresno County Superior Court Case No. 14CECL05299. A true and correct copy is attached hereto as Exhibit 1.

2. Proof of Service filed by Wells Fargo on July 9, 2014, in Fresno County Superior Court Case No. 14CECL05299. A true and correct copy is attached hereto as Exhibit 2.
3. An October 23, 2014 Default Judgment entered against Riyadh Saddouq in Fresno County Superior Court Case No. 14CECL05299. A true and correct copy is attached hereto as Exhibit 3.
4. A July 22, 2015 Writ of Execution entered against Riyadh Saddouq in Fresno County Superior Court Case No. 14CECL05299. A true and correct copy is attached hereto as Exhibit 4.

The request will be granted pursuant to Evidence Code § 452(d). But, the court cannot accept as true the *contents* of pleadings or exhibits in the other action just because they are part of the court record or file. Such documents are inadmissible hearsay in the present case. [*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914]

### **Merits**

Here, the Plaintiff claims that he was “out of the country” at the time that Wells Fargo filed suit. See page 2 of the Complaint at lines 18-23. He further claims that the proof of service is false. *Id.* In the case at bench, the Declaration of the Process Server in the underlying suit notes that the address given to him was a business address. He states that he attempted personal service twice and then served an employee “John Doe” alleged authorized to accept service for Mr. Saddouq. See proof of service and affidavit of reasonable diligence of filed on July 9, 2014 in Case No. 14 CECL 05299.

As a matter of law, after expiration of the 6-month period, defendant may obtain relief by showing “lack of notice” of the proceedings (CCP § 473.5). Relief must be sought within 2 years of the default judgment or *180 days after* service of a written notice that the default judgment has been entered, whichever is earlier. [CCP § 473.5(a)] But, this type of relief is sought in the action in which notice was not given. A new suit is not filed. *Id.*

Finally, if all other time limits have expired, a defendant may be able to raise the improper service of summons by collateral attack: i.e., a separate suit in **equity** to have the judgment set aside for lack of jurisdiction; or defendant may wait until the judgment is sought to be enforced and then raise the lack of jurisdiction as a defense to its enforcement. [*Donel, Inc. v. Badalian* (1978) 87 Cal.App.3d 327, 333-334] Therefore, contrary to Defendant’s arguments, the case at bench is not barred by the doctrine of collateral estoppel.

By the same token, if Plaintiff is simply seeking to have the judgment set aside, he must so plead and be prepared to present evidence in support of his claim that he did not receive “actual notice”. On the other hand, if the Plaintiff seeks damages for the allegedly invalid service, he will have to research and ascertain the particular cause of action applicable to the scenario. At present, the Complaint is simply a narrative. But, a complaint must contain “a statement of the *facts* **constituting the cause of action**, in

ordinary and concise language.” [CCP § 425.10] The “facts” to be pleaded are those upon which liability depends—i.e., “the facts constituting the cause of action.” These are commonly referred to as “ultimate facts.” [See *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531 at 550] Although the Plaintiff is self-represented, it is not the court’s responsibility to “make the case” for him. Therefore, the general demurrer will be sustained with leave to amend.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

**Issued By:** JYH **on 8/8/16.**  
(Judge's initials) (Date)



(17)

**Tentative Ruling**

Re: ***MHC-Four Seasons, L.P. v. Winter et al***  
Court Case No. 16 CECG 01854

Hearing Date: August 9, 2016 (Dept. 402)

Motion: Court's Own Motion to reclassify as a Limited Civil Matter

**Tentative Ruling:**

To grant the Court's motion and reclassify the case as a civil limited matter. (Civ. Code., § 85, subd. (c)(1).)

**Explanation:**

This is a proceeding brought under section 798.61 of the Civil Code. Subdivision (c)(1) of Civil Code 798.61, reads in pertinent part: "Thirty or more days following posting pursuant to subdivision (b), the management may file a petition in the superior court in the county in which the mobile home park is located, for a judicial declaration of abandonment of the mobile home. *A proceeding under this subdivision is a limited civil case.*" (Emphasis added.) Such an action's status as a limited civil case is confirmed by its listing in Code of Civil Procedure section 85, subdivision (c). (See Code Civ. Proc., § 85, subd. (c)(1).)

"The court, on its own motion, may reclassify a case at any time." (Code Civ. Proc., § 403.040, subd. (a).) The instant action appears to have been improvidently filed as an unlimited civil action. Accordingly, on July 27, 2016, the Court set the instant hearing date for this motion to reclassify and invited briefing on whether the matter should be reclassified as a limited civil matter.

No briefing having been received, the Court orders this matter reclassified as a limited civil matter.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

Issued By:     JYH     on 8/8/16.  
                    (Judge's initials)      (Date)

# **Tentative Rulings for Department 403**

(2)

## **Tentative Ruling**

Re: ***Hernandez et al. v Salinas et al.***  
Superior Court Case No. 14CECG02632

Hearing Date: August 9, 2016 (Dept. 403)

Motion: Petition to Compromise Minor's Claim

### **Tentative Ruling:**

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

### **Tentative Ruling**

Issued By:     KCK     on 8/8/16.  
(Judge's initials) (Date)

**Tentative Ruling**

Re: **Rogers v. Vestal**  
Case No. 14 CE CG 02861

Hearing Date: August 9<sup>th</sup>, 2016 (Dept. 403)

Motion: Defendants' Motion to Compel Physical Examination of  
Plaintiff Patricia Rogers

**Tentative Ruling:**

To deny defendants' motion to compel a physical examination of plaintiff by Dr. Hoyt, as no demand to have plaintiff examined by Dr. Hoyt has been served. (Code Civ. Proc. § 2032.240, subd. (b).)

However, if defendants are forced to bring another motion to compel an examination with Dr. Hoyt after serving a proper demand, then the court will be inclined to grant the motion to compel and impose full monetary sanctions against plaintiff.

**Explanation:**

First of all, defendants have once again moved to compel plaintiff's medical examination under the wrong code section. They move under Code of Civil Procedure section 2032.310. However, section 2032.310 relates to cases where the defendant is not entitled to a medical examination of the plaintiff as a matter of right, or where the defendant seeks a mental examination of the plaintiff. In such cases, the defendants must seek a court order before obtaining an examination of the plaintiff. (Code Civ. Proc. § 2032.310.)

Here, plaintiff has alleged a personal injury claim, so the defendants are entitled to a medical examination of plaintiff without first seeking a court order. They simply need to serve a demand for an examination. (Code of Civ. Proc. § 2032.220, subd.'s (a), (b).) The plaintiff is then required to respond to the demand in writing, with a statement that she "will comply with the demand as stated, will comply with the demand as specifically modified by the plaintiff, or will refuse, for reasons specified in the response, to submit to the demanded physical examination." (Code Civ. Proc. § 2032.230, subd. (a).)

"If a plaintiff to whom a demand for a physical examination under this article is directed fails to serve a timely response to it, that plaintiff waives any objection to the demand." (Code Civ. Proc. § 2032.240, subd. (a).) Also, if the plaintiff fails to respond to the demand, "The defendant may move for an order compelling response and compliance with a demand for a physical examination." (Code Civ. Proc., § 2032.240, subd. (b).) No meet and confer effort is required before the defendant may move to compel a response. (*Ibid.*)

Issued By: KCK on 8/8/16.  
(Judge's initials) (Date)

(17)

**Tentative Ruling**

Re: ***Navy Federal Credit Union v. Nkosi***  
Court Case No. 15 CECG 02121

Hearing Date: August 9, 2016 (Dept. 403)

Motion: Plaintiff's Motion for Assignment Order

**Tentative Ruling:**

To deny.

**Explanation:**

Assignment orders are authorized by Code of Civil Procedure 708.510 et seq. (Code Civ. Proc., § 708.510, subd. (a).) All or part of a right to payment due, or to become due, may be ordered assigned whether or not such right is conditioned upon future developments. (*Ibid.*) However, nothing in the Code of Civil Procedure indicates what sort of evidentiary showing is required to obtain an assignment order and no reported California cases address this issue. Nevertheless, numerous unreported federal cases hold that some evidentiary support is required. (See *Aleman v. AirTouch Cellular* (2012) 209 Cal.App.4th 556, 576, fn. 8 [unpublished federal district court cases may be properly considered].)

“ ‘[D]etailed evidentiary support’ is not required under [section] 708.510. But some evidentiary support is still needed; [section] 708.510 refers to a ‘payment due or become due,’ which suggests some degree of concreteness to the expected payment is required.” (*Legal Additions LLC v. Kowalksi* (N.D.Cal. July 26, 2011 No. C–08–2754, 2011 WL 3156724, at \*2 (emphasis omitted) (internal citations omitted)). “Certainly, there needs to be more than just speculation before the remedy of an assignment can be provided.” (*Ibid.*; *Passport Health, Inc. v. Travel Med, Inc.* (E.D. Cal., Apr. 16, 2012, No. 2:09-CV-01753-GEB) 2012 WL 1292473, at \*4.)

Here, plaintiff alleges on information and belief that defendant is owed some sort of income from Platinum Imports, LLC due to an ownership interest assumed to exist because of two facts, one of which appears to be unfounded. The first fact, that defendant is the company's agent for service of process, does not bear strongly in favor of finding that defendant owns the entity. The second fact, that Platinum Imports, LLC and defendant share the same address, would show a close connection between defendant and the entity, however, the address provided by the Secretary of State is not the address at which plaintiff is serving defendant.

An assignment order is not appropriate on this showing.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order

**Issued By:** KCK **on** 8/8/16.  
                    (Judge's initials)         (Date)

(29)

### Tentative Ruling

Re: ***Crystal Backowski v. Jose Figueroa, et al.***  
Superior Court Case No. 16CECG01981

Hearing Date: August 9, 2016 (Dept. 403)

Motion: Release mechanic's lien

### Tentative Ruling:

To grant the petition. Petitioner is directed to submit to this court, within 10 days of service of the minute order, a proposed judgment consistent with the requirements of Civil Code section 8490, subdivision (a). To deny the request for attorney's fees.

**Explanation:**

Petitioner has met the requirements to remove the lien from the property located at 3105 Lincoln Avenue in Clovis (see Civ. Code §8480, *et seq.*), and Respondent has filed no opposition. The Court did not find a proposed order in the file.

Petitioner seeks attorney's fees in the amount of \$1,500, but has provided no evidence in support of the request. (Civ. Code 8488(c).)

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

Issued By: KCK on 8/8/16.  
(Judge's initials) (Date)

# **Tentative Rulings for Department 501**

(19)

## **Tentative Ruling**

Re: ***In Re Mortgage Equity Conversion Asset Trust 2011-1***  
Fresno Superior Court Case No. 16CECG01593

Hearing Date: August 9, 2016 (Department 501)

Motion: by petitioner to perpetuate testimony before action filed

### **Tentative Ruling:**

To deny.

### **Explanation:**

Code of Civil Procedure section 2035.010 states (emphasis added):

“(a) One who expects to be a party or expects a successor in interest to be a party to any action that may be cognizable in any court of the State of California, whether as a plaintiff, or as a defendant, or in any other capacity, may obtain discovery within the scope delimited by Chapters 2 (commencing with Section 2017.010) and 3 (commencing with Section 2017.710), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010) for the purpose of perpetuating that own testimony or that of another natural person or organization, or of preserving evidence for use in the event an action is subsequently filed.

(b) ***One shall not employ the procedures of this chapter for the purpose either of ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed.***”

The instant petition expressly states that the purpose of the proposed depositions is to determine if a valid cause of action for quiet title exists, a prohibited basis for seeking this relief.

Brown & Weil, Civil Procedure Before Trial (TRG, 2016), section 8:421 states that the petition must include: “The *facts to be established* by the proposed testimony (note that this *precludes* discovery for the purpose of ascertaining what the facts are!) . . .” (Emphasis in original.) Petitioner’s admission that they want to ascertain the history of any transfers also requires denial.

The deed of trust, any recorded instruments, and other written documents (loan application, mortgage, etc.) which are “connected with the subject matter of the proposed discovery,” are not attached to the petition, as required by Code of Civil Procedure section 2035.030(b)(5).



**Issued By:** MWS **on** 8/4/16.  
(Judge's initials) (Date)

**Tentative Ruling**

Re: ***Nannini v. Arbor Faire Senior Apartments, et al.***  
Case No. 15 CE CG 01104

Hearing Date: August 9<sup>th</sup>, 2016 (Dept. 501)

Motion: Defendant GSF Properties' Motions to File Cross-Complaint  
and Continue Trial

**Tentative Ruling:**

To grant defendant's motion to file a cross-complaint against cross-defendant Lawrence Keith, dba Keith's Tubfixer. (Code Civ. Proc. §§ 426.50; 428.50, subd. (c).)

To grant defendant's motion to continue the trial date. (Cal. Rules of Court, Rule 3.1332.) The December 5<sup>th</sup>, 2016 trial date shall be vacated. Counsel for all parties shall appear at the hearing to discuss the setting of a new trial date.

**Explanation:**

**Motion to File Cross-Complaint:** Code of Civil Procedure section 426.50 states that,

A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at any time during the course of the action. The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action. (Code Civ. Proc., § 426.50.)

Also, under section 428.50,

(a) A party shall file a cross-complaint against any of the parties who filed the complaint or cross-complaint against him or her before or at the same time as the answer to the complaint or cross-complaint.

(b) Any other cross-complaint may be filed at any time before the court has set a date for trial.

(c) A party shall obtain leave of court to file any cross-complaint except one filed within the time specified in subdivision (a) or (b). Leave may be granted in the interest of justice at any time during the course of the action. (Code Civ. Proc., § 428.50.)

In addition, under section 428.10,

A party against whom a cause of action has been asserted in a complaint or cross-complaint may file a cross-complaint setting forth either or both of the following:

...

(b) Any cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or (2) asserts a claim, right, or interest in the property or controversy which is the subject of the cause brought against him. (Code Civ. Proc., § 428.10, subd. (b).)

Here, defendant GSF seeks to file a cross-complaint against Lawrence Keith, dba Keith's Tubfixer, based on the allegation that Keith is the one who performed the modifications on the bathtub that allegedly led to the water intrusion and black mold that injured the plaintiff. Thus, the cross-complaint arises out of the same transaction or occurrence that is the basis for plaintiff's complaint, and it asserts claims that are the same as the subject of the cause of action brought against defendant in the underlying complaint. While the cross-complaint was not filed as a matter of right before the trial date was set, it appears that it would be in the interests of justice to allow defendant to file its cross-complaint now, as defendant needs to bring its indemnity and contribution claims against Keith or risk waiving them.

Plaintiff has not opposed the motion to file the cross-complaint, and it does not appear that there would be any prejudice if the motion were granted, especially if the trial date is continued, which defendant has also requested. Therefore, the court intends to grant leave to file the cross-complaint.

**Motion to Continue Trial:** Under Rule of Court 3.1332, subdivision (c),

Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance only on an affirmative showing of good cause requiring the continuance. Circumstances that may indicate good cause include: ...

(5) The addition of a new party if: (A) The new party has not had a reasonable opportunity to conduct discovery and prepare for trial; or (B) The other parties have not had a reasonable opportunity to conduct discovery and prepare for trial in regard to the new party's involvement in the case... (Cal Rules of Court, Rule 3.1332, subd. (c)(5).)

Here, defendant is seeking leave to file a cross-complaint against a new party, Lawrence Keith. The trial date is presently set for December 5<sup>th</sup>, 2016, which is only about four months away. Clearly, Mr. Keith and the other parties will not have enough

time to conduct discovery and prepare for trial after he has been added to the case and has filed an answer to the cross-complaint. Therefore, the court intends to grant the request for a trial continuance. The current trial date of December 5<sup>th</sup>, 2016 will be vacated. Counsel for all parties shall appear at the hearing and be prepared to discuss setting a new trial date.

Pursuant to CRC 3.1312 and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## Tentative Ruling

Issued By: MWS on 8/4/16.  
(Judge's initials) (Date)

# **Tentative Rulings for Department 502**

(6)

## **Tentative Ruling**

Re: ***Frias v. Community Behavioral Health Center***  
Superior Court Case No.: 14CECG01780

Hearing Date: August 9, 2016 (**Dept. 502**)

Motions:

- 1) By Defendant Community Behavioral Health Center to compel response of Plaintiff Diana Frias to supplemental request for production of documents (set one);
- (2) By Defendant Community Behavioral Health Center to compel response of Plaintiff Rudy Archuleta to supplemental request for production of documents (set one);
- (3) By Defendant Community Behavioral Health Center to compel response of Plaintiff Rudy Archuleta to supplemental interrogatories (set one);

## **Tentative Ruling:**

To grant, with Plaintiffs' verified responses to the interrogatories and requests for production of documents, without objection, due within 10 days after service of this minute order on them.

## **Explanation:**

Failure to serve a timely response results in a waiver of all objections to the interrogatories and requests for production of documents (Code Civ. Proc., §§ 2030.290, 2031.300.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

## **Tentative Ruling**

Issued By: DSB on 8/8/16.  
(Judge's initials) (Date)

# **Tentative Rulings for Department 503**

(20)

## **Tentative Ruling**

Re: ***Klemmin v. Holistic and Integrative Medicine, et al.***, Superior Court Case No. 15CECG03149

Hearing Date: **August 9, 2016 (Dept. 503)**

Motion: Demurrers to Complaint by defendant Sonal Patel, M.D.

### **Tentative Ruling:**

To sustain Patel's demurrers to the Complaint, without leave to amend. (Code Civ. Proc. § 430.10(e).) Prevailing party to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action as to the demurring defendant.

### **Explanation:**

Where the dates alleged in the complaint show the action is barred by the statute of limitations, a general demurrer lies. (See *Saliter v. Pierce Bros. Mortuaries* (1978) 81 Cal.App.3d 292, 300.) The running of the statute must appear "clearly and affirmatively" from the face of the complaint. It is not enough that the complaint might be time-barred. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) Which statute of limitations applies depends on the gravamen of the cause of action. (*Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 874-875.)

A claim for medical malpractice, upon discovery, is subject to a one-year statute of limitations. (Code Civ. Proc. § 340.5.) Such a claim may be tolled where a Notice of Intent is served upon the defendant health care provider(s), but only for the proscribed period. (See Code of Civ. Proc. § 364.)

Plaintiff basically alleges that the statute of limitations began to run by June 7, 2014 (Complaint ¶ 10), making June 7, 2015 the deadline for filing suit. Plaintiff alleges that she served defendants with a Notice of Intent to Sue on April 11-12, 2015. (Complaint ¶ 6.) Since the notice was "served within 90 days of the expiration of the applicable statute of limitations," the time to commence the action was "extended 90 days from service of the notice." (Code Civ. Proc. § 364(d).) Assuming the notices were served on April 12, the last day to file suit would be July 11, 2015. The Complaint was filed on October 9, 2015, clearly too late.

The court has no opposition on file. The docket reflects that plaintiff's oppositions were rejected for failure to comply with Local Rule 4.1.13. According to reply briefs, plaintiff argues in the oppositions that because plaintiff was comatose during part of

the hospitalization, the running of the statute of limitations was tolled. In the first paragraph 10 of the Complaint plaintiff alleges that she "discovered that the care of defendants's [sic], and each of them fell below the standard of care and was negligent in early June of 2014, **after** she was discharged from the hospital following a hospitalization that lasted for more than a month,, during much of which time she was unconscious ..." (Emphasis added.) Plaintiff then alleges that she "did not know and could not have knwon [sic] of the negligence of defendants, and each of them before approximately June 7, 2014." (Complaint first ¶ 10.) Plaintiff's own Complaint alleges that she discovered the negligence in early June 2014, or more specifically, June 7, 2014, after she was released from the hospital and no longer comatose. Even starting the clock when plaintiff alleges it should start, the action is untimely.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

#### **Tentative Ruling**

**Issued By:** A.M. Simpson **on** 8/8/16.  
(Judge's initials) (Date)

(6)

**Tentative Ruling**

Re: **Valley Children's Hospital v. Moua**  
Superior Court Case No.: 15CECG02967

Hearing Date: August 9, 2016 (**Dept. 503**)

Motions: (1) Application for writ of possession by Plaintiff Valley Children's Hospital;

(2) Motion to stay by Defendants John Moua, Paul Cuong Manh Do, David (Wee Kiat) Lee, and University Pediatric Specialists, Inc.;

(3) Motion to seal by Defendants John Moua, Paul Cuong Manh Do, David (Wee Kiat) Lee, and University Pediatric Specialists, Inc.;

(4) Demurrer to second amended complaint by Defendants John Moua, Paul Cuong Manh Do, David (Wee Kiat) Lee, and University Pediatric Specialists, Inc.

**Tentative Ruling:**

To deny the application for writ of possession; to grant the motion to stay pending final conclusion of the peer review proceedings, including the filing of any petitions for writ of mandate from those proceedings; to grant the motion to seal, in part, ordering sealed exhibits D, E, G, H, I, and N, attached to the declaration of Timothy Thompson which was lodged under seal, and to deny the remainder of the motion; to defer ruling on the demurrer to the second amended complaint until after the conclusion of the peer review proceedings, including the filing of any petitions for writ of mandate from those proceedings, and lifting of the stay.

For those portions of the records the Court has granted the motion to seal, moving parties are to file new redacted documents that comply with this order in substitution of those already filed. For those portions of the records the Court has denied the motion to seal, moving parties are to proceed pursuant to California Rules of Court, rule 2.551(b)(6), including return of all lodged records that will not be sealed to moving parties unless within 10 days they notify the clerk that the record is to be filed pursuant to California Rules of Court, rule 2.551(b)(6), with moving parties to submit the substituted records which are being sealed pursuant to California Rules of Court, rule 2.551(d). Moving parties should contact management in the civil unlimited department to arrange for the substitution of lodged and return of lodged materials. This includes the materials for which the motion is being denied, which is the entire motion for stay, excepting exhibits D, E, G, H, I, and N, attached to the declaration of Timothy Thompson which was lodged under seal, which the Court ordered sealed.



The parties shall inform the Court at today's hearing when the peer review process will preliminary conclude so that the Court may set a future status conference hearing.

**Explanation:**

Application for writ of possession

Valley Children's Hospital, Inc. ("Valley Children's") admits that the USB drive belongs to Defendant John Moua. Consequently, Valley Children's has not shown it is entitled to immediate and exclusive possession of the USB device itself. (Code Civ. Proc., § 512.060; *RCA Service Co. v. Superior Court* (1982) 137 Cal.App.3d 1.)

As to the data which the USB device contains, it is intangible, not tangible personal property. Intangible property cannot be replevied. (*Englert v. IVAC Corp.* (1979) 92 Cal.App.3d 178, 184.)

Motion for stay

The Court grants a stay pursuant to the primary jurisdiction doctrine, staying this matter until the final conclusion of the peer review proceeding, including the filing of any petitions for writ of mandate from those proceedings.

"No rigid formula exists for applying the primary jurisdiction doctrine [citation]. Instead, resolution generally hinges on a court's determination of the extent to which the policies noted above are implicated in a given case. [Citations.] This discretionary approach leaves courts with considerable flexibility to avoid application of the doctrine in appropriate situations, as required by the interests of justice." (*Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 Cal.4th 917, 932-933.)

The interests of justice warrant a stay of this action until the final conclusion of the peer review proceeding. Although the medical executive committee is not an administrative agency per se, it is statutorily, and by virtue of Valley Children's bylaws, tasked with determining the validity of the charges against the Defendant Doctors leading to their summary suspension from clinical privileges. Because the peer review proceeding is statutorily mandated, it is considered an official proceeding to which the primary jurisdiction doctrine can apply. (Bus. & Prof. Code, §§ 805, 809-809.9.) Additionally, because the hospital's peer review decisions have a status comparable to that of quasi-judicial public agencies whose decisions are reviewable by administrative mandate, the primary jurisdiction doctrine applies.

The doctrine of primary jurisdiction of administrative agencies is invoked to require resort to an administrative agency to resolve issues within its particular area of expertise. Although it normally applies where the claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body, the judicial process is suspended pending

referral of the issues to the administrative body for its view. The primary jurisdiction doctrine advances two related policies: it enhances court decision making and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws. (*Jonathan Neil & Associates, Inc. v. Jones, supra*, 33 Cal.4th 917, 931-932.)

The Court has reviewed the notices of charges against the defendant Doctors against the allegations of the complaint, and finds many, if not all, of the issues overlap. Permitting the medical executive committee, with its specialized expertise, to decide these issues first, will enhance this court's decision making process and efficiency. A stay until the peer review proceeding is finally concluded, including the filing of any petitions for writ of mandate from those proceedings, will also narrow the issues that will ultimately need to be determined in court, because unless overturned by a petition for writ of mandate, the findings of fact of the medical executive committee would be binding. (Bus. & Prof. Code, § 809.8; *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1499.

While it's true that Evidence Code section 1157 provides that peer review proceedings and records are not discoverable, the statute does not provide that decisions of the peer review proceeding are not admissible. For example, persons who attend any meetings of the peer review proceeding shall not be required to testify as to what transpired at the meeting(s), but nothing prevents them from voluntarily doing so. (Evid Code, § 1157, subd. (b).) The prohibition relating to discovery or testimony does not apply to the statements made by a person if the person is a party to an action or proceeding the subject matter of which was reviewed at the meeting, or to a person requesting hospital staff privileges, or in an action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within policy limits. (Evid Code, § 1157, subd. (c).) Consequently, Evidence Code section 1157 does not work against a stay of this lawsuit until final conclusion of the peer review proceeding.

#### Motion to seal

The Court finds that the documents attached as exhibits D, E, G, H, I, and N, attached to the declaration of Timothy Thompson, lodged conditionally under seal, should be sealed pursuant to the hospital's bylaws, at least until the final conclusion of the peer review proceeding, in order to maintain confidentiality of that proceeding. The remainder of the motion to seal is denied.

In the future, only items actually sought to be sealed should be submitted conditionally under seal.

#### Demurrer

The Court defers ruling on the demurrer, pending the outcome of the peer review proceeding. One way or the other, it is likely that the outcome of the peer review proceeding will require a change either to the pleadings, or to the demurrer itself. Deferring a ruling until conclusion of the peer review proceeding will conserve judicial resources.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**

**Issued By:** A.M. Simpson **on** 8/8/16.  
(Judge's initials) (Date)